Supreme Court, U.S.
FILED
DEC 8 1992
OFFICE OF THE CLERK

No. 92-5129

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1992

JOHN L. SULLIVAN,

Petitioner,

vs.

STATE OF LOUISIANA,

Respondent.

ON WRIT OF CERTIORARI TO THE
SUPREME COURT OF THE STATE OF LOUISIANA

PETITIONER'S BRIEF ON THE MERITS

John Wilson Reed
GLASS & REED
338 Lafayette Street
New Orleans, LA 70130
Telephone: (504) 581-9065

William J. Keppel
Counsel of Record
Michael J. Wahoske
Christopher J. Riley
Tamara J. Byram
Karen A. Fairbairn
DORSEY & WHITNEY
220 South Sixth Street
Minneapolis, MN 55402
Telephone: (612) 340-2600

Attorneys for Petitioner

1992 - Dorsey & Whitney, 220 South Sixth Street, Minneapolis, MN 55402 - (612) 340-8863

QUESTION PRESENTED

Whether a constitutionally deficient reasonable doubt instruction can be found harmless error?

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
TABLE OF CONTENTS	ii
TABLE OF AUTHORITIES	v
OPINIONS BELOW	1
STATEMENT OF JURISDICTION	1
CONSTITUTIONAL AND STATUTORY PROVISIONS	2
STATEMENT OF THE CASE	3
A. Course of Proceedings and Disposition Below	3
B. The Trial Facts	3
C. The Jury Argument	8
D. The Jury Instructions	8
E. The Appeal to the Louisiana Supreme Court	10
SUMMARY OF ARGUMENT	11
ARGUMENT	14
I. THE ERRONEOUS REASONABLE DOUBT INSTRUCTION ON WHICH THE JURY VERDICT WAS PREMISED CANNOT BE DISMISSED AS HARMLESS ERROR	14
A. The Right to Trial by Jury is a Guarantee Assuring that Citizens, Not Judges, Make Determinations of Fact in Criminal Cases	14
B. A Denial of the Right to Have a Jury Make the Determination of Guilt or Innocence is a Fundamental Error not Subject to Harmless Error Review	18
C. A Jury's Determination of Guilt Must be Made by a Standard of Proof Beyond a Reasonable Doubt	20
D. An Instruction that Allows a Jury to Find Facts at a Level of Certainty Lower than that Required by Due Process Falls Among those Fundamental Errors Not Appropriate for Harmless Error Analysis	24
1. The error which occurred here has long been regarded by this Court as too fundamental to allow harmless error review	25
2. The error involves rights that are both structural and fundamental	26
3. The error is distinct from other instructional errors found harmless	31
4. The error leaves the record without an objective basis for harmless error review and thus defies such analysis	35
5. The error here is not harmless	38

E. The Louisiana Supreme Court Opinion on Harmless Error Represents Appellate Fact Finding Constitutionally Proscribed by the Sixth Amendment and Impermissible Under Any Interpretation of *Chapman v. California* 40

CONCLUSION 44

TABLE OF AUTHORITIES

CASES

Anders v. California,
386 U.S. 738 (1967) 28

Arizona v. Fulminante,
111 S. Ct. 1246 (1991) 10,19,27,28,29,30,35

Bollenbach v. United States,
326 U.S. 607 (1946) 23,24,25,35,44

Cage v. Louisiana,
111 S. Ct. 328 (1990) 1,3,8,9,22,29,42

Carella v. California,
491 U.S. 263 (1989) 10,17,18,19,31,33,34,37,38

Chapman v. California,
386 U.S. 18 (1967) 14,40,42

Connecticut v. Johnson,
460 U.S. 73 (1983) 31,32

Cuyler v. Sullivan,
446 U.S. 335 (1980) 28

Davis v. United States,
160 U.S. 469 (1895) 22,29

Delaware v. Van Arsdall,
473 U.S. 673 (1986) 36

Duncan v. Louisiana,
391 U.S. 145 (1968) 11,14,15,16,17,20

Gideon v. Wainwright,
372 U.S. 335 (1963) 27

Henderson v. Kibbe,
431 U.S. 145 (1977) 22

Holloway v. Arkansas,
435 U.S. 475 (1978) 27,37

In re Winship,
397 U.S. 358 (1970) 12,20,21,23

Ivan V. v. City of New York,
407 U.S. 203 (1972) 21

Jackson v. Virginia,
443 U.S. 307 (1979) 17,25,26,30,36,41

Kentucky v. Whorton,
441 U.S. 786 (1979) 30

Louisiana v. Cage,
554 So. 2d 39 (La. 1989) 10

Louisiana v. Sullivan,
596 So. 2d 177 (La. 1992) 1,11

Pope v. Illinois,
481 U.S. 497 (1987) 34,35,37

Powell v. Alabama,
287 U.S. 45 (1932) 27

Rose v. Clark,
478 U.S. 570 (1986) 10,18,19,28,32,33,35

Sandstrom v. Montana,
442 U.S. 510 (1979) 31

Satterwhite v. Texas,
486 U.S. 249 (1988) 36

Sparf & Hanson v. United States,
156 U.S. 51 (1895) 17

Taylor v. Kentucky,
436 U.S. 478 (1978) 30

Taylor v. Louisiana,
419 U.S. 522 (1975) 15

Tumey v. Ohio,
273 U.S. 510 (1927) 28,37

United Brotherhood of Carpenters v.
United States, 330 U.S. 395 (1947) 12,17,25

United States v. Martin Linen
Supply Co., 430 U.S. 564 (1977) 17,26

Weiler v. United States,
323 U.S. 606 (1945) 17

Yates v. Evatt,
111 S. Ct. 1884 (1991) 10,12,31,33,37,38,42

CONSTITUTIONAL AND STATUTORY PROVISIONS

United States Constitution, Amendment VI 2

United States Constitution, Amendment XIV 2

28 U.S.C. § 1257 (1988) 2

La. Code Crim. Proc. Ann.
arts. 905.6 & 905.8 (West 1978) 3

La. Rev. Stat. Ann. § 14:30
(West 1979) 2

MISCELLANEOUS

Model Code of Professional Responsibility,
EC 7-19 (1980) 28

In The
SUPREME COURT OF THE UNITED STATES
October Term, 1992

No. 92-5129

JOHN L. SULLIVAN,
Petitioner,
vs.
STATE OF LOUISIANA,
Respondent.

ON WRIT OF CERTIORARI TO THE
SUPREME COURT OF THE STATE OF LOUISIANA

PETITIONER'S BRIEF ON THE MERITS

OPINIONS BELOW

The Louisiana Supreme Court opinion, holding that the instruction given the jury on reasonable doubt was constitutionally deficient under *Cage v. Louisiana*, 111 S. Ct. 328 (1990) (per curiam), but that this error was harmless, is reported at 596 So. 2d 177 (La. 1992). (J.A. 11). The Louisiana Supreme Court denied both petitioner's and the state's separate requests for rehearing. (J.A. 48).

STATEMENT OF JURISDICTION

The opinion and judgment of the Louisiana Supreme Court was entered on March 2, 1992. The Louisiana

Supreme Court denied the state's and petitioner's separate petitions for rehearing on April 9, 1992. Petitioner sought a writ of certiorari on July 8, 1992. This Court granted the petition on October 19, 1992. (J.A. 49). The jurisdiction of this Court is invoked under 28 U.S.C. § 1257 (1988).

CONSTITUTIONAL AND STATUTORY PROVISIONS

The Sixth Amendment to the Constitution of the United States provides, in pertinent part:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed . . . .

The Fourteenth Amendment to the Constitution of the United States provides, in pertinent part:

> [N]or shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Louisiana Revised Statute section 14:30 reads today, in pertinent part, as it did at the time of petitioner's trial:

> A. First degree murder is the killing of a human being:
>
> (1) When the offender has specific intent to kill or to inflict great bodily harm and is engaged in the perpetration or attempted perpetration of . . . armed robbery . . . .

La. Rev. Stat. Ann. § 14:30 (West 1979).

STATEMENT OF THE CASE

The question before the Court is whether a constitutionally deficient reasonable doubt instruction can be harmless error. Because petitioner relied on his constitutional right to have a jury determine issues of fact and guilt, the error here cannot be found harmless.

A. Course of Proceedings and Disposition Below

Petitioner John L. Sullivan was convicted of first degree murder and sentenced to death. On direct appeal, the Supreme Court of Louisiana found that the reasonable doubt instruction given, although erroneous under *Cage v. Louisiana*, 111 S. Ct. 328 (1990) (per curiam), was harmless error and affirmed the conviction. (J.A. 26-28). The court further held that petitioner was denied effective assistance of counsel at the penalty phase of the trial, vacated the death sentence, and remanded for a new sentencing hearing.1/

B. The Trial Facts

On April 14, 1980 at about 4:00 A.M., a New Orleans bar, the C-Note Lounge, was robbed by two men. A patron of the barroom, Joe King, was killed by a shot from a weapon held by one of those men. (Tr. 192-93). The two robbers had entered the dimly lit bar a short time earlier and had ordered beers from the barmaid. (Tr. 313, 318-19). One of them had shot a game of pool with King. (Tr. 282). When the game was over, the two men met at the bar.

1/ At the remanded sentencing proceeding, the only two choices available to the jury, and to the court, will be life imprisonment without parole or the death penalty. La. Code Crim. Proc. Ann. arts. 905.6 & 905.8 (West 1976).

(Tr. 283, 285). One pulled out a sawed-off shotgun and pointed it at King. (Tr. 366). A single shot discharged at close range killed King. (Tr. 366). Together, the two men at gunpoint then robbed another patron, Mark Legorretta, of a gold wristwatch, (Tr. 367-68), and the barmaid, Stephanie Lowery, of the contents of the cash register, about $150. (Tr. 290-91). The robbers then fled.

At about noon that same day, the police arrested Michael Hillhouse inside a barroom about a mile from the C-Note and at the same time arrested John Sullivan outside that barroom. (Tr. 222-23). Hillhouse, with $53 in his pockets, was wearing a blue pinstriped vest, a plaid shirt, and light-colored pants. (Tr. 236-37). The latter two articles of clothing were later identified by the barmaid Lowery as those worn by one of the robbers. (Tr. 294). Sullivan, with $86 in his pockets, was wearing a gold wristwatch, blue jeans and a maroon shirt. (Tr. 226, 228, 237). The blue jeans and the shirt were never said to be connected to the killing.

Hillhouse was immediately interrogated by the police. While in custody Hillhouse suffered injuries sufficiently serious that by sometime between three and five o'clock that afternoon he was transferred to a hospital for medical treatment. (Tr. 419, 470). An inmate, who saw Hillhouse at the line-up two weeks later, testified at trial that Hillhouse displayed injuries including a cut on the side of his eye, a cut on his chin, and bruises on his hands, his shins, and on the back of his sides. (Tr. 455-60). The witness recounted that Hillhouse, when asked what had happened, said, "The police beat me . . . [t]o make me talk. They just kept beating me trying to make me talk." (Tr. 459). A second inmate testified that in February 1981 he overheard Hillhouse, when asked by Sullivan why he had said what he did, answer "because they kept beating me." (Tr. 447-48). When that witness suggested to Hillhouse that he say something about it, Hillhouse

responded that he couldn't, "because they will beat me again." (Tr. 448).

In his interrogation by the police, Hillhouse confessed involvement in the robbery and killing, but disavowed all responsibility for the killing itself. That, he told the police, was committed by his companion, a person he called "Bub," but whom he later identified as the other man arrested, John Sullivan. (Tr. 436). Pursuant to his statement, Hillhouse directed the police to a nearby apartment. The police conducted a search and recovered a blue pinstriped jacket that Hillhouse said was worn by Sullivan during the robbery but that matched the vest worn by Hillhouse at his arrest, (Tr. 262, 266); a sawed-off shotgun later ballistically identified as the murder weapon, (Tr. 260-61); and a black flight bag from which Hillhouse said Sullivan had originally produced the weapon, (Tr. 263). Hillhouse also directed the police to a car he said was Sullivan's and had been used in the robbery. (Tr. 225). No evidence, however, from or concerning the car or its ownership was introduced at trial.

Although Hillhouse was a previously convicted felon, (Tr. 383), and although by his own statement he was concededly a principal to armed robbery and second degree murder, (Tr. 548-49), the state agreed to give him immunity from any prosecution, not only for the killing, but also for the robbery. He was, nevertheless, kept in custody, first as an accessory and then as a material witness, with the prosecution's guarantee that once the trial was over he would go free. (Tr. 419).

Clothed with total immunity, Hillhouse fully incriminated Sullivan at trial. Claiming to have met his accomplice only five or six hours earlier at another bar, the Polka Dot Lounge, (Tr. 384-85), Hillhouse testified that it was his accomplice's idea: the accomplice had asked Hillhouse if he would like to make quick money. (Tr. 389). He testified it was his accomplice's weapon: the

accomplice had taken it from a black bag handed to him by the bartender at that bar. (Tr. 389). He also testified that it was his accomplice's deed. According to Hillhouse, it was he, Hillhouse, who had shot pool with King, (Tr. 362), but it was the accomplice who had pulled out the shotgun, shot King in the chest, reloaded the gun, and taken the gold watch from Legorretta and the cash from Lowery. (Tr. 366, 395). The accomplice, said Hillhouse, was John Sullivan. (Tr. 366).

Hillhouse acknowledged that during the robbery he had worn the same light-colored pants and plaid shirt in which he was arrested. (Tr. 374-75). He stated that the accomplice had been wearing a blue pinstriped suit, consisting of a matching jacket and pants -- not the clothes John Sullivan was wearing upon arrest. (Tr. 237, 373). Hillhouse's explanation was that after the robbery, he and the man he had identified as Sullivan had first gone back to the Polka Dot and then to a nearby restaurant where, he said, Sullivan had left him for thirty minutes. (Tr. 403). When Sullivan returned, said Hillhouse, he was wearing different clothes. (Tr. 404). Hillhouse said that Sullivan then took him to an apartment where Hillhouse claimed he again saw the shotgun, the black bag, and also a pin-striped vest matching the suit Hillhouse said Sullivan wore in the robbery, which vest Hillhouse then borrowed and was wearing at the time of arrest. (Tr. 375-76, 407).

In this apartment, the police, acting on Hillhouse's information, found the shotgun, the black bag, and the blue pinstriped jacket, but not any blue pinstriped pants. (Tr. 260, 262). Hillhouse claimed that the apartment where this evidence was found had been described by Sullivan as his "wife's." (Tr. 372). Hillhouse identified the gold watch worn by Sullivan at his arrest as "looking like" the watch that was taken.[2/] (Tr. 395-96). Recalled as a rebuttal witness to explain his post-arrest injuries,

---

2/ Legorretta, the patron of the bar, did not testify.

Hillhouse admitted a cut chin, but denied being beaten by the police or telling anyone that he had been, claiming rather that he had suffered an epileptic seizure. (Tr. 471).

Of the six witnesses in the bar at the time of the robbery, the state called only one -- the barmaid Stephanie Lowery. Within days of the killing, Lowery had attended a formal physical line-up of eight persons, including both Sullivan and Hillhouse. (Tr. 296-98). She identified neither. (Tr. 297). In fact, as she conceded on cross-examination, she made identifications in her mind of two persons other than Hillhouse and Sullivan. (Tr. 342-43). It was not until another week passed, when she was summoned into the privacy of the district attorney's office, and where, after reviewing for fifteen minutes a black and white photograph of the line-up, that she made an identification of Sullivan. (Tr. 298, 341).

Lowery testified that she had seen neither the shooting itself nor the taking of the watch. (Tr. 327). At trial she identified Sullivan, however, as the person she saw holding the shotgun to Legorretta's head after she got up from behind the bar, where she had ducked when she heard the shot. (Tr. 288-89). Uncertain of the pattern or material of the killer's "blue jacket and blue pants," (Tr. 292, 325), she could identify the blue jacket found at the apartment only as being "something similar" to the one worn by the killer. (Tr. 325).

There was no scientific or forensic evidence connecting John Sullivan either with the offense generally or with the shooting specifically. Although police had removed the perpetrators' beer cans from the bar, no fingerprints were introduced into evidence. Similarly, the state introduced no fingerprints from the recovered weapon or from the car that Hillhouse said was used. Although the shotgun was shown to be the murder weapon, no scientific evidence suggested that Sullivan fired it.

C. The Jury Argument

John Sullivan did not testify. The defense argued Sullivan's innocence to the jury by emphasizing reasonable doubt. (Tr. 513-14). There was reasonable doubt about the testimony of Hillhouse, a convicted felon, whose incrimination of Sullivan to the police, by his own statements to fellow inmates, came only after the duress of a police beating, and whose trial testimony against Sullivan came only after a grant of immunity and the promise of freedom. (Tr. 526-28). There was reasonable doubt about the circumstantial evidence that was linked more to Hillhouse than to Sullivan, and to Sullivan principally on the testimony of Hillhouse. (Tr. 508, 515-21). There was reasonable doubt about the testimony of Lowery, who at the earliest opportunity to make an identification had not only failed to identify Sullivan but identified someone else. (Tr. 504). There was reasonable doubt about the intent of the shooter -- was there an unknown provocation, a reason, an accidental discharge? (Tr. 500). There was reasonable doubt about the lack of evidence: the five witnesses not called (Tr. 510); the scientific evidence not even attempted; the missing pair of pants and perhaps the person wearing them. (Tr. 520). There was reasonable doubt, said the defense, whether John Sullivan was the real accomplice of Hillhouse.

D. The Jury Instructions

The jury was instructed that it was to acquit only if it had an "actual or substantial doubt," only if it had a "grave uncertainty." (J.A. 2). The jury was to be guided in that assessment by "moral certainty." (J.A. 2).3/ The jury instruction was in almost exact terms the jury instruction

---

3/ In contrast to evidentiary certainty. *See Cage v. Louisiana*, 111 S. Ct. at 330.

condemned by this Court in *Cage v. Louisiana*, 111 S. Ct. 328 (1990) (per curiam). The exact instruction was as follows:

> If you entertain any reasonable doubt as to any fact or element necessary to constitute the defendant's guilt, it is your sworn duty to give him the benefit of that doubt and return a verdict of acquittal. Even where the evidence demonstrates a probability of guilt, yet if it does not establish it beyond a reasonable doubt, you must acquit the accused. This doubt must be a reasonable one; that is, one founded upon a real, tangible, substantial basis, and not upon mere caprice, fancy or conjecture. It must be such a doubt as would give rise to a grave uncertainty, raised in your minds by reason of the unsatisfactory character of the evidence; one that would make you feel that you had not an abiding conviction to a moral certainty of the defendant's guilt. If, after giving a fair and impartial consideration to all of the facts in the case, you find the evidence unsatisfactory upon any singel [sic] point indispensably necessary to constitute the defendant's guilt, this would give rise to such a reasonable doubt as would justify you in rendering a verdict of not guilty.
>
> A reasonable doubt is not a mere possible doubt. It should be an actual or substantial doubt. It is such a doubt as a reasonable person would seriously entertain. It is a serious doubt, for which you could give good reason.

(J.A. 2-3). On that instruction, the jury returned a verdict of guilty as charged of first degree murder. (J.A. 1). The following day, it returned a sentence of death. (J.A. 1)..

E. The Appeal to the Louisiana Supreme Court

On petitioner's appeal, the Louisiana Supreme Court had before it not only this Court's opinion in *Cage*, holding a virtually identical instruction constitutionally erroneous, but also its own decision on the remand of *Cage* holding that error to be a mere "trial error" subject to harmless error analysis under *Arizona v. Fulminante*, 111 S. Ct. 1246 (1991). *Louisiana v. Cage*, 583 So. 2d 1125 (La.), *cert. denied*, 112 S. Ct. 211 (1991). In applying the harmless error rule on the *Cage* remand, the Louisiana Supreme Court had considered the "entire record." *Id.* at 1128-29. It had twice relied on the language of *Rose v. Clark*, 478 U.S. 570, 579 (1986): "Where a reviewing court can find that the record developed at trial establishes guilt beyond a reasonable doubt, the interest in fairness has been satisfied and the judgment should be affirmed." 583 So. 2d at 1128.4/ It had reached its own conclusion on remand that, in Cage's case, there was "no significant evidence which would have caused reasonable doubt." *Id.* Two justices dissented, believing the harmless error rule was inapplicable. *Id.* at 1130-36 (Calogero, C.J., & Dennis, J. dissenting).

On this appeal, the Louisiana Supreme Court followed its previous decision in *Cage*. It held the jury instruction erroneous but subject to harmless error consideration. It applied a harmless error rule in the same "whole record" way that it had in *Cage* and concluded the error here was

---

4/ This Court has since indicated that this language suggests an inappropriate standard of review for cases involving presumptions. *Yates v. Evatt*, 111 S. Ct. 1884, 1892 n.8 (1991); *Carella v. California*, 491 U.S. 263, 267 (1989) (concurring opinion).

harmless. Conceding that Lowery's testimony might be entitled to no weight, it nevertheless deemed that the "unrefuted" testimony of Hillhouse was sufficiently "corroborate[d]" by the evidence at the apartment that it could say that "[t]he evidentiary record clearly *supports* a finding that the erroneous instruction was harmless beyond a reasonable doubt." *Louisiana v. Sullivan*, 596 So. 2d 177, 186 (La. 1992) (emphasis added). (J.A. 28).

SUMMARY OF ARGUMENT

The accused's right to have a jury, not a court, decide guilt or innocence by the standard of proof beyond a reasonable doubt sharply limits the availability of harmless error review of an erroneous reasonable doubt instruction. Where, as here, factual guilt is contested, any harmless error analysis would require judicial fact-finding and thereby violate the right to trial by jury. The opinion of the Louisiana Supreme Court represents precisely such impermissible judicial fact-finding.

The right to trial by jury is the right to have the government's evidence and the truth of its accusations tested and weighed by ordinary citizens, not by judges or other appointees of the government. The right is ultimately the single most powerful bulwark placed by the founding fathers between the powers of the government and the freedom of the individual. *Duncan v. Louisiana*, 391 U.S. 145 (1968). Its denial can never be harmless. The corollary of the right is that judicial fact-finding that substitutes for jury fact-finding violates the right to trial by jury.

The fundamental measure by which juries find facts and determine the "truth" of a government accusation is the standard of proof beyond a reasonable doubt. The truth of allegations that would condemn an accused must be found by the fact-finder beyond a reasonable doubt or it is not found at all. A jury verdict returned on a standard

BEST AVAILABLE COPY

short of proof beyond a reasonable doubt is a verdict without constitutional significance. *In re Winship*, 397 U.S. 358 (1970).

The right to trial by jury and the standard of proof beyond a reasonable doubt combine in the rule that the task of determining the "truth" of the government's accusation to the requisite certainty is constitutionally reserved to the jury. Those considerations necessarily constrict any possibility of applying harmless error analysis to a flawed reasonable doubt instruction that leaves a jury verdict devoid of any constitutionally cognizable jury fact-finding. This Court has consistently recognized that a jury finding reached beyond a reasonable doubt is so fundamental that its absence cannot be harmless error. Cases from *United Brotherhood of Carpenters v. United States*, 330 U.S. 395 (1947), through *Yates v. Evatt*, 111 S. Ct. 1884 (1991), acknowledge that appellate fact-finding cannot substitute for a failure of the jury to find facts beyond a reasonable doubt without doing violence to the constitutional imperative that guilt can be determined only by a jury.

The reasonable doubt instruction possesses all the qualities that, under the *Fulminante* opinions, excludes it from harmless error review. A reasonable doubt instruction that correctly insures that a jury will convict only on the degree of proof required by due process is an integral part of the structural guarantee of trial by jury. It is the basic protection without which a criminal trial fails at its function of enabling juries to find the truth. The reasonable doubt instruction is the mechanism by which juries function. To allow that function to be supplanted by courts is to destroy the meaning of trial by jury and the right to jury fact-finding.

An erroneous reasonable doubt instruction prevents a jury from fulfilling its truth-finding task in the only way permissible -- by proof beyond a reasonable doubt. It leaves a record empty of any jury findings of

constitutional certainty. There can be no assurance that the jury determined anything to the required certitude. It is quite distinct from an unconstitutional burden-shifting presumption, which may be subject to harmless error review. Though such presumptions affect the jury's truth-finding task, the jury still functions to find predicate facts beyond a reasonable doubt, against which facts the harmlessness of the error can be judged.

Harmless error analysis cannot be conducted where there are no factual findings beyond a reasonable doubt against which to conduct it. In all applications of harmless error analysis, there is a baseline finding to the requisite degree of constitutional certainty. Against that sure finding, the significance of individual rulings can be evaluated. Here, there is no jury finding beyond a reasonable doubt. Any attempt at harmless error analysis involves a court not simply in making assessments about what a jury did and how it did it, but in making its own original factual assessments in place of those never made by the constitutionally guaranteed trier of fact. The error is one that defies harmless error analysis.

If it were possible to conduct harmless error analysis of an erroneous reasonable doubt instruction, it would have to be an analysis wholly unlike the typical form. It could not be one focused on the supposed persuasiveness of the evidentiary record. Only if it could be said that, in the circumstances of the case, the reasonable doubt instruction played no role might the failing be disregarded. Such a situation might arise if a jury determination of guilt were conceded, and yet the trial proceeded for other reasons -- for example, to preserve a question of law. This is not such a case. It was a case fought out on a claim of innocence requiring jury resolution to determine each elemental fact beyond a reasonable doubt. Whatever room may otherwise exist for harmless error analysis, it has no place here.

The opinion of the Louisiana Supreme Court purporting to apply harmless error analysis in fact evaluates evidence and makes raw credibility choices about witnesses. Its analysis is true neither to the requirement that it focus on how the erroneous instruction functioned nor even to the obligation set forth in *Chapman v. California*, 386 U.S. 18 (1967), to place the burden on the state to eliminate any reasonable possibility that the error contributed to the verdict. The court's opinion exemplifies appellate fact-finding in complete contravention of the right to trial by jury.

ARGUMENT

THE ERRONEOUS REASONABLE DOUBT INSTRUCTION ON WHICH THE JURY VERDICT WAS PREMISED CANNOT BE DISMISSED AS HARMLESS ERROR.

A. The Right to Trial by Jury is a Guarantee Assuring that Citizens, Not Judges, Make Determinations of Fact in Criminal Cases.

Since 1789, the Sixth Amendment has established an accused's right to have his guilt or innocence determined by a jury. Applied to the states through the Fourteenth Amendment, this right to "[t]rial by jury in criminal cases is fundamental to the American scheme of justice." *Duncan v. Louisiana*, 391 U.S. 145, 149 (1968). This recognition, and the historical record on which it is based, does not stem merely from a supposition that the informed common sense of jurors is better suited to the ascertainment of truth than the refined and experienced intellect of judges. The right exists, rather, as a protection against governmental oppression. As a barrier to the will of the government, it places the citizenry itself between

the government and the accused. *Id.* at 154-56; *Taylor v. Louisiana*, 419 U.S. 522, 530 (1975).

Fundamentally, the right to trial by jury is the right not to be tried by a representative of the government which brings the charges; it is a right not to be tried by judges beholden to the government that employs them and pays them. As such, it is a fundamental protection against the dangers of governmental power.

It was on those premises that this Court rested its decision in *Duncan*. 391 U.S. at 145. Tracing the history of trial by jury from the Magna Carta to the Constitution, the Court recognized the role of trial by jury as a structural barrier between the government and the accused. The Court quoted Blackstone:

> "Our law has therefore wisely placed this strong and two-fold barrier, of a presentment and a trial by jury, between the liberties of the people and the prerogative of the crown. . . . [T]he founders of the English law have, with excellent forecast, contrived that . . . the truth of every accusation, whether preferred in the shape of indictment, information, or appeal, should afterwards be confirmed by the unanimous suffrage of twelve of his equals and neighbours indifferently chosen and superior to all suspicion."

Id. at 151-52 (quoting 4 W. Blackstone, *Commentaries on the Laws of England* 349-50 (Cooley ed. 1899)).

In its own words, and acknowledging the English and Colonial experience, including the objections of the colonists to "trials before judges dependent upon the crown alone for their salaries," *id.* at 152, the Court wrote of the great purposes served by trial by jury:

> A right to jury trial is granted to criminal defendants in order to prevent oppression by the Government. Those who wrote our constitutions knew from history and experience that it was necessary to protect against unfounded criminal charges brought to eliminate enemies and against judges too responsive to the voice of higher authority. . . . Providing an accused with the right to be tried by a jury of his peers gave him an inestimable safeguard against the corrupt or overzealous prosecutor and against the compliant, biased, or eccentric judge. . . . [T]he jury trial provisions in the Federal and State Constitutions reflect a fundamental decision about the exercise of official power -- a reluctance to entrust plenary powers over the life and liberty of the citizen to one judge or to a group of judges. Fear of unchecked power, so typical of our State and Federal Governments in other respects, found expression in the criminal law in this insistence upon community participation in the determination of guilt or innocence.

Id. at 155-56.

The right to trial by jury thus does not simply reflect a judgment about the truth-finding ability of a lay jury. It embodies the fundamental reservation to the people of the power to weigh and to reject the accusations brought by a government against a citizen. It is true that juries find facts well; as the Court observed in *Duncan*, they "do understand the evidence and come to sound conclusions in most of the cases presented to them." *Id.* at 157. But they do more than that. In service to the citizenry, they

protect an accused in ways not necessarily measured in fact-finding terms. "[W]hen juries differ with the result at which the judge would have arrived, it is usually because they are serving some of the very purposes for which they were created and for which they are now employed." *Id.*

Fair and equitable fact-finding processes that substitute for the citizen jury can be imagined. None, however, provides the structural protection afforded by a system that altogether excludes the government, or any of its representatives, from the determination of factual guilt. That is the quality of trial by jury that makes it the central component of "the structure and style of the criminal process -- the supporting framework and the subsidiary procedures." *Id.* at 150 n.14. It is a "structural guarantee." *Carella v. California*, 491 U.S. 263, 268 (1989) (concurring opinion).

Inasmuch as trial by jury is a prohibition against government agents determining guilt, it follows that courts are constitutionally forbidden to take from the jury, and to arrogate to themselves, the power to determine guilt.[5/] No matter how overwhelming and clear cut the evidence may be, a judge can neither enter a verdict of guilty nor direct the jury to enter a verdict of guilty. *United States v. Martin Linen Supply Co.*, 430 U.S. 564, 573 (1977); *United Brotherhood of Carpenters v. United States*, 330 U.S. 395, 408 (1947); *Sparf & Hanson v. United States*, 156 U.S. 51, 105 (1895). "[U]nder our system of justice, juries alone have been entrusted with th[e] responsibility [of determining a defendant's guilt]." *Weiler v. United States*, 323 U.S. 606, 611 (1945). Because only a jury may exercise the power to determine factual guilt, "[a] defendant may assuredly insist upon observance of this guarantee even when the evidence against him is so overwhelming as to establish guilt beyond a reasonable

---

[5/] Of course, courts have the power to overrule juries in order to protect innocence. *Jackson v. Virginia*, 443 U.S. 307, 324 (1979).

doubt." *Carella*, 491 U.S. at 268 (concurring opinion). The Constitution reserves that power to the jury.

B. A Denial of the Right to Have a Jury Make the Determination of Guilt or Innocence is a Fundamental Error not Subject to Harmless Error Review.

There are some rights that are so basic to the structure of a fair trial that their denial is always reversible error. Among them is the right to trial by jury -- the right to have a jury and not a court determine guilt. As the Court said in *Rose v. Clark*, "[h]armless error analysis thus presupposes a trial at which the defendant, represented by *counsel*, may present evidence and argument before an impartial *judge* and *jury*." 478 U.S. 570, 578 (1986) (emphasis added). The Court specifically described the first two, counsel and the judge, as "basic protections [without which] a criminal trial cannot reliably serve its function as a vehicle for the determination of guilt or innocence, and no criminal punishment may be regarded as fundamentally fair." *Id.* at 577-78 (citation omitted). To those the Court added, in even more ringing terms, the right to a jury. Noting those rulings prohibiting judicial arrogation of the jury's authority to decide guilt, it recognized that the jury's authority was absolute. Without a jury determination of guilt, no verdict can stand, no matter the evidence:

> This rule stems from the Sixth Amendment's clear command to afford jury trials in criminal cases. Where that right [to trial by jury] is altogether denied, the State cannot contend that the deprivation was harmless because the evidence established the defendant's guilt; the error in such a case is that the wrong entity judged the defendant guilty.

Id. at 578 (citation omitted).

The opinions in *Arizona v. Fulminante*, 111 S. Ct. 1246 (1991), accept that a denial of the right to trial by jury can never be harmless. The majority opinion is based substantially on the language of *Rose*. Distinguishing between trial error and those errors that affect the "framework within which the trial proceeds," the Court specifically noted counsel and an impartial judge as key elements of the trial mechanism. *Id.* at 1265. Although it did not reference the jury itself, its reliance on the language of *Rose* and its description of "basic protections" implicitly acknowledge the jury as one of the three structural elements of the "framework within which the trial proceeds." *Id.* Even more than counsel who advocates evidence and the judge who admits or excludes it, the jury, which alone determines the weight to be given to that evidence, is the key component of the "trial mechanism." *Id.*

As trial by jury is a "structural guarantee," *Carella*, 491 U.S. at 268 (concurring opinion), so would its denial be a structural defect in the trial mechanism -- one that affects, indeed renders in vain, "[t]he entire conduct of the trial from beginning to end." *Fulminante*, 111 S. Ct. at 1265. Without the only structural element constitutionally empowered to determine guilt, the trial structure is a nullity. The dissenting opinion in *Fulminante* acknowledged that, whatever the analytic framework, the right to have the determination of guilt made by a jury is so fundamental that its denial can never be absolved. *Id.* at 1256 (White, J., dissenting).

Each of the *Rose*, *Carella* and *Fulminante* opinions embodies the awareness that the structural function of trial by jury rests among those "fundamental principles of liberty and justice which lie at the base of all our civil and

political institutions." *Duncan*, 391 U.S. at 148 (quoting *Powell v. Alabama*, 287 U.S. 45, 67 (1932) (itself quoting *Hebert v. Louisiana*, 272 U.S. 312, 316 (1926))). Within our system of justice, there can be no substitute for a jury's determination of guilt.

C. A Jury's Determination of Guilt Must be Made by a Standard of Proof Beyond a Reasonable Doubt.

The right to trial by jury is, of course, not an abstraction, satisfied by the mere presence of six or twelve citizens in the jury box. It is the right to have those citizens serve as fact-finders. In the American system of justice, fact-finding must be done pursuant to the only constitutionally acceptable standard for finding facts in criminal cases, the standard of proof beyond a reasonable doubt. *In re Winship*, 397 U.S. 358, 362 (1970). That standard is the constitutionally required "measure of persuasion by which the prosecution must convince *the trier* of all the essential elements of guilt." *Id.* at 361 (emphasis added) (quoting C. McCormick, *Evidence* § 321, at 681-82 (1954)). Like trial by jury, it "reflect[s] a profound judgment about the way in which law should be enforced and justice administered." *Id.* at 361-62 (quoting *Duncan*, 391 U.S. at 155). It "provides 'concrete substance' for the presumption of innocence -- that bedrock, 'axiomatic and elementary' principle whose 'enforcement lies at the foundation of the administration of criminal law.'" *Id.* at 363 (quoting *Coffin v. United States*, 156 U.S. 432, 453 (1895)). Just as it "is the duty of the government to establish . . . guilt beyond a reasonable doubt," *id.* at 362 (quoting *Leland v. Oregon*, 343 U.S. 790, 802-03 (1952) (Frankfurter, J., dissenting)), it is only the jury of citizens, interposed between that government and the accused, that can make the determination whether the government has fulfilled that burden.

The requirement of proof beyond a reasonable doubt is both an acknowledgment that "[t]here is always in litigation a margin of error," and a determination that where life and liberty are at stake, the risks of error must be cast in a way that protects the "transcending value" that an accused has in his liberty. *Id.* at 364 (quoting *Speiser v. Randall*, 357 U.S. 513, 525-26 (1958)). Since in a contested case it is impossible to "acquire unassailably accurate knowledge of what happened[,] [i]nstead all the fact-finder can acquire is a belief of what probably happened." *Id.* at 368, 370 (Harlan, J., concurring). Although the "intensity of this belief," *id.*, is not susceptible of exact measurement, the reasonable doubt formulation emphasizes the necessary "stringent standard for criminal trials." *Id.* at 372. It assures that "the moral force of the criminal law not be diluted by a standard of proof that leaves people in doubt whether innocent men are being condemned." *Id.* at 364 (opinion of the Court). It guarantees that the individual will not be condemned by the government except on evidence that "convince[s] a proper factfinder of his guilt with utmost certainty." *Id.* At bottom, the requirement of proof beyond a reasonable doubt reflects "a fundamental value determination of our society that it is far worse to convict an innocent man than to let a guilty man go free." *Id.* at 373 (Harlan, J., concurring).

Anything less than a standard of proof beyond a reasonable doubt both increases the unacceptable risk that the innocent will be wrongly convicted, *see Ivan V. v. City of New York*, 407 U.S. 203, 205 (1972) (per curiam), and decreases society's confidence in the reliability and certainty of the judgments that condemn its members to loss of liberty or loss of life. *See Winship*, 397 U.S. at 364 ("[U]se of the reasonable-doubt standard is indispensable to command the respect and confidence of the community in applications of the criminal law."). Whether the instructional failure be the absence of any reasonable doubt instruction at all, a preponderance

standard as in *Winship*, or, as here, an erroneous reasonable doubt instruction that "allow[s] a finding of guilt based on a degree of proof below that required by the Due Process Clause," *Cage v. Louisiana*, 111 S. Ct. at 330, the result is the same.6/ The fact-finder has not been instructed on the proper standard of proof and there is consequently no assurance that the facts were found to the constitutionally required level of certainty.

The instruction used here and in *Cage* may require a higher degree of jury certainty than the mere preponderance standard, but a verdict based upon it nevertheless lacks the assurance that the reasonable doubt standard embodies and that the Constitution compels. Such a verdict is entitled to no greater respect than one obtained with no standard whatever, for guilt, though it may not be ascertainable with mathematical precision, is nevertheless an absolute within our system of justice. Citizens are not a little bit guilty, mostly guilty, or substantially guilty. They are either guilty beyond a reasonable doubt, or they are not guilty at all.

The language of *Winship* confirms that where the right to trial by jury obtains, that right is not fulfilled unless the *jurors* are convinced of guilt beyond a reasonable doubt. The fact-finder to whom an accused is entitled is a jury of his or her peers, and if the right to such a fact-finder is meaningful, it is this fact-finder, and none other, who must make the factual findings of guilt beyond a reasonable doubt. Thus, the Court in *Winship* quoted from *Davis v. United States*, 160 U.S. 469, 493 (1895):

> No man should be deprived of his life under the forms of law unless *the jurors* who try him are able, upon *their* consciences, to say that the evidence before them . . . is sufficient to show beyond a reasonable doubt the existence of every fact necessary to constitute the crime charged.

397 U.S. at 363 (emphasis added). Repeatedly, this Court referred in *Winship* to the obligation to convince the "fact-finder" of guilt beyond a reasonable doubt.7/ The fact-finder who must be convinced is the trial jury.

As it is the defendant's right to have a jury make the determination of guilt or innocence, it is necessarily the defendant's right to have the jury make that determination according to the standard of proof beyond a reasonable doubt. As this Court said in *Bollenbach v. United States*:

> In view of the place of importance that trial by jury has in our Bill of Rights, it is not to be supposed that Congress intended to substitute the belief of appellate judges in the guilt of an accused, however justifiably engendered by the dead record, for ascertainment of guilt by a jury under

6/ Indeed, the omission of any instruction altogether may often be less prejudicial than a misstatement of the law. *See Henderson v. Kibbe*, 431 U.S. 145, 155 (1977).

7/ "'[T]he prosecution must *convince the trier* of all the essential elements of guilt.'" *Winship*, 397 U.S. at 361 (emphasis added) (quoting C. McCormick, *Evidence* § 321, at 681-82 (1954)). "'[T]his margin of error is reduced . . . by the process of placing on the other party the burden of . . . *persuading the fact-finder* at the conclusion of the trial of his guilt beyond a reasonable doubt.'" *Id.* at 364 (emphasis added) (quoting *Speiser*, 357 U.S. at 525-26). "[N]o man shall lose his liberty unless the government has borne the burden of . . . *convincing the factfinder* of his guilt." *Id.* (emphasis added) (quoting *Speiser*, 357 U.S. at 526). Every citizen must have confidence that he or she cannot be judged guilty of a criminal offense "without *convincing a proper factfinder* of his guilt with utmost certainty." *Id.* (emphasis added); *see also id.* at 369-73 (Harlan, J., concurring).

> appropriate judicial guidance, however cumbersome that process may be.

326 U.S. 607, 615 (1946). Under *Winship* and *Davis*, the irreducible minimum of the appropriate judicial guidance to which *Bollenbach* refers is an instruction that correctly permits the jury to convict only if it finds the facts to have been established by proof beyond a reasonable doubt, not by some other standard that allows guilt to be determined on a lesser degree of proof. Without a proper instruction, there has been no jury finding that fulfills the constitutional purpose of a jury.

D. An Instruction that Allows a Jury to Find Facts at a Level of Certainty Lower than that Required by Due Process Falls Among those Fundamental Errors Not Appropriate for Harmless Error Analysis.

The right to have a citizen jury and not a court make factual determinations of guilt, the requirement that the citizen jury make those factual determinations only when persuaded to the certainty required by the reasonable doubt standard, and the absence here of *any* jury findings actually made beyond a reasonable doubt -- all lead to the conclusion that no harmless error analysis can be performed here that is faithful to constitutional principles.

1. The error which occurred here has long been regarded by this Court as too fundamental to allow harmless error review.

It has long been the understanding of this Court that a jury verdict returned without a proper instruction on reasonable doubt cannot stand, that an instructional error which altogether vitiates the jury verdict is too fundamental to be subject to the harmless error rules. Beyond the language of *Bollenbach*, 326 U.S. at 615, noted above, is an even more imperative statement in *United Brotherhood of Carpenters*, 330 U.S. at 410 (footnote omitted), where this Court observed:

> No matter how clear the evidence, [a defendant is] entitled to have the jury instructed in accordance with the standards which Congress has prescribed. To repeat, guilt is determined by the jury, not the court. . . . [W]here the evidence against an accused charged with a crime is well-nigh conclusive and the court fails to give the reasonable-doubt instruction . . . [i]t could not be said that the failure was harmless error.

More recently in *Jackson v. Virginia*, 443 U.S. 307 (1979), in holding that a court could review the evidentiary sufficiency of a jury finding of guilt beyond a reasonable doubt, the Court emphasized that a properly instructed jury finding is a *sine qua non:*

> Our cases have indicated that failure to instruct a jury on the necessity of proof of guilt beyond a reasonable doubt *can never be harmless error.* Thus, a defendant whose

> guilt was actually proved by overwhelming evidence would be denied due process if the jury was instructed that he could be found guilty on a mere preponderance of the evidence.

Id. at 320 n.14 (emphasis added) (citations omitted).

The language of *Martin Linen Supply*, 430 U.S. at 564, leads to the same conclusion. There the Court restated the structural purpose of a jury: "to stand between the accused and a potentially arbitrary or abusive Government that is in command of the criminal sanction." *Id.* at 572. "For this reason," said the Court, "a trial judge is prohibited from entering a judgment of conviction or directing the jury to come forward with such a verdict, regardless of how overwhelmingly the evidence may point in that direction." *Id.* at 572-73 (citations omitted). Although an instruction to convict on less than proof beyond a reasonable doubt does not itself "direct" a verdict, it has an equivalent effect. It directs a jury, indeed misdirects a jury, to return a judgment of conviction without a finding of guilt beyond a reasonable doubt. Conversely, the application of harmless error becomes the precise equivalent of a trial court entering a judgment of conviction. The defective verdict is replaced by a court's assessment of the evidence, and the constitutional role of the jury is supplanted by the judiciary. *Martin Linen* thus indicates that a jury verdict returned with the constitutional level of certainty is not only fundamental, but so much so that there can be no judicial substitute.

2. The error involves rights that are both structural and fundamental.

The assumption of the foregoing cases is reaffirmed by the Court's analyses of harmless error review in

Fulminante. **Viewing the issue within the structural framework described by the *Fulminante* majority, or examining it in terms of the basic values and rights emphasized by the *Fulminante* minority, the conclusion is the same -- an erroneous reasonable doubt instruction strikes at the heart of the criminal trial.**

The majority opinion in *Fulminante* distinguished between trial errors occurring during the presentation of a case to a jury and capable of quantitative harmless error assessment, and structural defects inhering in the trial mechanism itself and defying analysis by harmless error standards. 111 S. Ct. at 1264-65. The instant error falls into the latter category. Structural errors are those which render a criminal trial fundamentally unfair because it cannot "reliably" serve its function as a "vehicle" for the "determination" of guilt. *Id.* at 1265. A jury, of course, is *the* constitutional "vehicle" for determining guilt, and reasonable doubt is *the* constitutional standard by which that "determination" is made to the degree of "reliability" commanded by the Constitution. A trial that proceeds without a jury properly instructed on reasonable doubt fails at its basic function.

The structural elements of a fair trial explicitly identified in *Fulminante* -- counsel and the court -- are distinctly ancillary to the third element, the jury's determination of guilt beyond a reasonable doubt. *Fulminante* recognizes that the trial mechanism requires not simply that there be a counsel and that there be a court, but that each be able to fulfill its constitutionally assigned function in service to the jury and the decisional process by which guilt is reliably determined. Thus, the right to a fair trial is structurally denied not only when counsel is altogether absent, *Gideon v. Wainwright*, 372 U.S. 335 (1963), or functionally so, *Powell v. Alabama*, 287 U.S. 45 (1932), but also when an actual conflict of interest adversely affects counsel's performance. *Compare Holloway v. Arkansas*, 435 U.S. 475 (1978) *with Cuyler v.*

Sullivan, 446 U.S. 335 (1980). The denial of counsel "acting in the role of an advocate," *Anders v. California*, 386 U.S. 738 (1967), is not prejudicial simply for its betrayal of the client's interests, but for the harm it does to the truth-seeking function of the trial process and to the ability of the jury to reach a just and reliable conclusion.8/ The absence of an advocate who serves the fact-finding tribunal is thus a structural defect that renders the determination of guilt inherently unfair. It is a structural defect that resists harmless error analysis. *Rose v. Clark*, 478 U.S. at 577-78, *cited in Fulminante*, 111 S. Ct. at 1265.

The second structural element identified in *Fulminante* may be similarly viewed. It is not simply "a judge" who is a fundamental element of the trial mechanism, but rather a judge presumptively capable of impartially controlling the proceedings and the flow of evidence. *Tumey v. Ohio*, 273 U.S. 510, 532, 535 (1927). Again, the ultimate end served by the judge is the integrity and reliability of the jury fact-finding that rests on that evidence. Without the assurance of a fair judge, the determination of guilt cannot be regarded as "fundamentally fair." *Fulminante*, 111 S. Ct. at 1265

8/ Ethical Consideration 7-19 of the Model Code of Professional Responsibility explains that a lawyer's obligation is as much to the court and the jury as to the defendant:

> An adversary presentation counters the natural human tendency to judge too swiftly in terms of the familiar that which is not yet fully known; the advocate, by his zealous preparation and presentation of facts and law, *enables the tribunal* to come to the hearing with an open and neutral mind and to render impartial judgments. The duty of a lawyer to his client and his duty to the legal system are the same: to represent his client zealously within the bounds of the law.

Model Code of Professional Responsibility EC 7-19 (1980) (emphasis added) (footnotes omitted).

(quoting *Rose*, 478 U.S. at 577). There is again a structural defect incapable of *post hoc* appellate remedy. *Id.*

A reasonable doubt instruction is as critical to the functioning of the third element of the trial mechanism, the jury, as advocacy is to counsel or impartiality to the court. Without a correct instruction on reasonable doubt, the jury cannot fulfill its constitutionally assigned task of finding facts in the only way that facts can be constitutionally found in a criminal proceeding. Whether the jury receives no instructions whatever; whether the jury is instructed to find facts only by a preponderance, *Davis*, 160 U.S. at 487-88; or whether, as here, the instruction permits the jury to convict on "a degree of proof below that required by the Due Process Clause," *Cage v. Louisiana*, 111 S. Ct. at 330, the failing is the same. A jury that functions pursuant to a standard of proof below that required by due process is a jury that constitutionally might as well not be there at all. The defect is a structural one. The resulting verdict is one that does not "reliably serve its function as a vehicle for determination of guilt or innocence." *Fulminante*, 111 S. Ct. at 1265 (quoting *Rose*, 478 U.S. at 577-78).

Determining whether there is a reasonable doubt as to guilt is the very *raison d'etre* of the trial mechanism. As *Fulminante* says, "the central purpose of a criminal trial is to decide the defendant's factual guilt or innocence." *Id.* at 1264. That central purpose can be achieved only by a jury instructed to determine the truth by proof beyond a reasonable doubt. Any diminution in that standard is an error that "transcends the criminal process," that affects the trial process "from beginning to end," and that deprives a defendant of a "basic protection." *Id.* at 1265. Under that analysis it is a structural defect that cannot be disregarded as harmless. *See id.* at 1264-65.

The minority in *Fulminante* did not adopt the dichotomy between structural errors affecting the trial framework and trial errors susceptible to quantitative

assessment. It emphasized rather "the nature of the right at issue and the effect of an error upon the trial." *Id.* at 1255 (White, J., dissenting). Under this analysis, the minority opinion left no doubt that a defective reasonable doubt instruction was an error too fundamental to be salvaged by harmless error review. Quoting *Jackson v. Virginia*, 443 U.S. at 320 n.14, that a failure to instruct on reasonable doubt could never be harmless, and distinguishing *Kentucky v. Whorton*, 441 U.S. 786 (1979), that a failure to instruct on the presumption of innocence could be, the minority observed:

> While it may be possible to analyze as harmless the omission of a presumption of innocence instruction when the required reasonable doubt instruction has been given, it is impossible to assess the effect on the jury of the omission of the more fundamental instruction on reasonable doubt. In addition, omission of a reasonable doubt instruction, though a "trial error," *distorts the very structure of the trial* because it creates the risk that the jury will convict the defendant even if the State has not met its required burden of proof. *Cf. Cool v. United States*, 409 U.S. 100, 104 (1972); *In re Winship*, 397 U.S. 358, 364 (1970).

Fulminante, 111 S. Ct. at 1255 (White, J., dissenting) (emphasis added).[9] A verdict returned on an instruction that lowers the standard of proof suffers the same vice as

[9] *Cf. Taylor v. Kentucky*, 436 U.S. 478 (1978) (conviction reversed where failure to charge presumption of innocence was accompanied by a suspect reasonable doubt instruction and other factors diluted reasonable doubt).

one returned on none. The risk persists that the defendant was convicted without persuasion of the jury to the requisite degree.

3. The error is distinct from other instructional errors found harmless.

The Court's opinions from *Connecticut v. Johnson*, 460 U.S. 73 (1983), to *Yates v. Evatt*, 111 S. Ct. 1884 (1991), analyzing unconstitutional burden-shifting presumptions for harmless error consistently distinguish a failure to instruct on reasonable doubt as an error not subject to harmless error review. An unconstitutional presumption may "invade the truth-finding task assigned solely to juries," *Carella*, 491 U.S. at 265, but it nevertheless still requires the jury to decide the predicate facts beyond a reasonable doubt and leaves jury fact-findings as a basis for harmless error review. An erroneous reasonable doubt instruction, on the other hand, altogether prevents the jury from performing its constitutional task. There is a complete failure of jury fact finding.

That an erroneous reasonable doubt instruction is different in kind from an erroneous presumption, and as such could not be analyzed as harmless, was first emphasized by the dissent in *Connecticut v. Johnson*, 460 U.S. at 90 (Powell, J., dissenting). Observing that a presumption "does not remove the issue of intent from the jury's consideration," the dissent distinguished a failure to instruct on reasonable doubt, which would "prevent a jury from considering an issue." *Id.* at 95 n.3. The dissent concluded that a "*Sandstrom* [burden-shifting] error[10] . . . is not comparable to an instruction that can never be harmless -- for example, an instruction

[10] *Sandstrom v. Montana*, 442 U.S. 510 (1979).

that fails to inform the jury that it must find guilt beyond a reasonable doubt." *Id.* at 98 n.6.

In *Rose v. Clark*, the Court undertook harmless error analysis only after assuring itself that the jury was "clearly instructed that it had to find [the defendant] guilty beyond a reasonable doubt as to every element." 478 U.S. at 579. It then specifically adopted the distinction of the *Johnson* dissent between an unconstitutional presumption and a failure to instruct on reasonable doubt. Because of the presence of actual jury findings beyond a reasonable doubt, the Court rejected a contention that a presumption had the same effect as a directed verdict proscribed by *Martin Linen*:11/

> Nor is *Sandstrom* error equivalent to a directed verdict for the State. When a jury is instructed to presume malice from predicate facts, it still must find the existence of those predicate facts beyond a reasonable doubt. In many cases, the predicate facts [thus found] conclusively establish intent . . . . In that event the erroneous presumption is superfluous: the jury has found, in *Winship's* words, "every fact necessary" to establish every element of the offense beyond a reasonable doubt.

Id. at 580-81 (citations omitted). At the same time the Court explicitly distinguished a failure to instruct on reasonable doubt as an error that indeed *prevented* the jury from making findings beyond a reasonable doubt:

> Because a presumption does not remove the issue of intent from the jury's consideration, it is distinguishable from other instructional errors that prevent a jury from considering an issue. *Connecticut v. Johnson*, 460 U.S. at 95 n.3 (Powell, J., dissenting). Cf. *Jackson v. Virginia*, 443 U.S. 307, 320 n.14 (1979) (suggesting that failure to instruct a jury as to the reasonable-doubt standard cannot be harmless).

Id. at 580 n.8. Implicitly, the opinion recognizes that a verdict returned without proper instruction on reasonable doubt suffers the vice of the directed verdict condemned in *Martin Linen*.

The later presumption cases, *Carella* and *Yates*, both focus on the constitutional and analytic necessity of reviewing instructional error in terms of the facts the jury found beyond a reasonable doubt. They are mindful of the constitutional proscription against courts making their own factual findings. *Yates* eschewed inquiry into what a jury *could have* reasonable concluded; the issue is whether "the jury actually rested its verdict," *Yates*, 111 S. Ct. at 1893, on facts found beyond a reasonable doubt. Both relied on the language of *Rose* to analyze the effect of a presumption by reference to the assurance that the jury had at least found the predicate facts beyond a reasonable doubt; *Yates* specifically disavowed broader language from *Rose* that seemed to countenance an appellate sufficiency analysis. *Id.* at 1892 n.8; *see also Carella*, 491 U.S. at 266.

The concurrence in Carella explicitly acknowledged that an accused's structural right to have factual determinations made by a jury, and the prohibition against judges doing so, were controlling factors in the application of harmless error analysis. "These principles

---

11/ Whether a presumption had this effect had previously divided the *Johnson* plurality, 460 U.S. at 84, and the *Johnson* dissent, *id.* at 94 (Powell, J., dissenting).

necessarily circumscribe the availability of harmless-error analysis when a jury has been instructed to apply a conclusive presumption." *Carella*, 491 U.S. at 269 (concurring opinion). Positing a conclusive presumption that did not necessarily flow from the predicate facts, the opinion explained:

> [T]he problem would not be cured by an appellate court's determination that the record evidence *unmistakably* established guilt, for that would represent a finding of fact by judges, not by a jury. As with a directed verdict, "the error in such a case is that the wrong entity judged the defendant guilty."

Id. (emphasis added) (quoting *Rose*, 478 U.S. at 578). Later, accepting that the error of a jury verdict returned on a permissive but rebutted presumption might be validated by appellate review of the whole record, the concurrence emphasized that "it is quite another [thing] to say that the jury's failure to make any factual determination of the elemental fact . . . will be similarly disregarded." *Id.* at 273. In every case the touchstone is a jury finding beyond a reasonable doubt, necessarily predicated on a proper reasonable doubt instruction.12/

Between them, *Carella* and *Yates* reaffirm the language of *Bollenbach:* "The question is not whether guilt may be spelt out of a record, but *whether guilt has*

12/ The willingness of the Court in *Pope v. Illinois*, 481 U.S. 497 (1987), to subject a non-presumption instructional error to harmless error review was similarly based on the existence of jury findings beyond a reasonable doubt. Those facts which the jury had found beyond a reasonable doubt, despite a faulty instruction on community standards, were the premise for the application of harmless error review. *See id.* at 503; *see also Carella*, 491 U.S. at 270-71 (concurring opinion).

been found by a jury according to the procedure and standards appropriate for criminal trials . . . ." 326 U.S. at 614 (emphasis added). The distinctive failing of the instructional error here was that neither guilt nor any fact at all was found by a jury with the requisite degree of certainty.

4. The error leaves the record without an objective basis for harmless error review and thus defies such analysis.

As the Court explained in *Fulminante*, some errors simply defy harmless error analysis because the defect pervades or alters the structure of the trial process, making it impossible for the court to determine whether the error was harmless based on the trial record. 111 S. Ct. at 1264-65; *accord id.* at 1254-55 (White, J., dissenting). These "structural errors" result in automatic reversal. The lack of a correct reasonable doubt instruction is such an error because, without this instruction, the record is devoid of any "facts found by the jury," *Pope v. Illinois*, 481 U.S. 497, 503 n.6 (1987), upon which the court can determine the harmlessness of the error. *Fulminante*, 111 S. Ct. at 1255 (White, J., dissenting) ("[I]t is impossible to assess the effect on the jury of the omission of the more fundamental instruction on reasonable doubt.").

In performing harmless error analysis, the court uses the jury's verdict as the reference point in measuring the impact of an error. Since the verdict is, by nature, a showing of the jury's findings as to each element of the offense beyond a reasonable doubt, the court can examine those findings to assess the magnitude of the error. In fact, harmless error analysis has always been conducted only with the assurance that the jury in any event made a finding of guilt based on a proper instruction of proof beyond a reasonable doubt. *See Rose v. Clark*, 478 U.S. at 580 (harmless error applied because jury was required to

find the presumption-triggering facts beyond a reasonable doubt); *see also Jackson*, 443 U.S. at 318 (only after determining whether the jury was instructed properly under *Winship* is the court to review the sufficiency of the evidence).

In cases of improperly admitted evidence, for example, the court examines for harmless error by striking the erroneously-admitted evidence and considering the untainted evidence supporting the required element or finding. *See, e.g., Satterwhite v. Texas*, 486 U.S. 249, 258-59 (1988). Because the jury found that element beyond a reasonable doubt, the court can consider the relative strength of the untainted evidence and the prejudicial impact of the error and can make a satisfactory determination of the effect the error had on the jury. A similar process is followed in reviewing an improper limitation on defense cross-examination of a government witness. *See, e.g., Delaware v. Van Arsdall*, 475 U.S. 673, 684 (1986). In every case, the jury's elemental findings beyond a reasonable doubt are the benchmark against which the assessment is made.

As discussed in the preceeding section, a similar, although more narrowly focused, process is followed when the instructions to the jury included an improper burden-shifting presumption. In those cases, harmless error analysis is based on predicate facts, found by a jury beyond a reasonable doubt, which allow the court to determine whether the effect of the improper presumption was harmless. The absence of any such findings defeats the possibility of performing the analysis. Thus, a jury finding beyond a reasonable doubt remains the benchmark for harmless error review.

Since without a proper reasonable doubt instruction the reviewing court has no assurance that the fact-finder has found any elemental fact by the constitutionally required standard, it is impossible for the court in such cases to determine whether the error was harmless.

Harmless error analysis in these situations would involve the court not in "preserv[ing] a jury's findings" but in "supplement[ing] those findings." *Pope*, 481 U.S. at 497, 509 (Stevens, J., dissenting). This is precisely the kind of speculation that the harmless error doctrine does not countenance, and neither does the Constitution. *Id.* A "subjective enquiry into the jurors' minds," *Yates*, 111 S. Ct. at 1893, is inappropriate.

This situation is similar to the errors in *Holloway*, counsel with a conflict of interest, and in *Tumey*, a biased judge, in that each of these structural errors requires reversal because it affects the composition of the record in indeterminable ways. The reviewing court cannot know precisely how the record was affected by the conflicted counsel or what unconflicted counsel would have done differently. *Holloway*, 435 U.S. at 490-91. Likewise, it cannot determine the effects of a biased judge. *Tumey*, 273 U.S. at 532, 535. In such cases, where the error prevents the court from confidently reviewing the impact of the error, harmless error analysis is not appropriate. *See Holloway*, 435 U.S. at 490; *Carella*, 491 U.S. at 270 (concurring opinion).

Here the error does not affect the evidentiary content of the record presented to the jury and preserved for this Court, but it does affect the record in a way that is even more unfathomable. It leaves the reviewing court without any knowledge that the jury was persuaded with constitutional certainty of any element of the offense. The court is left without any sure guide to the jury's evaluation of credibility and conflict. It has only its own constitutionally prohibited speculations about the jury's certitude. It has no reference for harmless error analysis.

5. The error here is not harmless.

As the concurring opinion in *Carella* stated, an error such as occurred here "would not be cured by an appellate court's determination that the record evidence *unmistakably* established guilt, for that would represent a finding of fact by judges, not a jury. As with a directed verdict, 'the error in such a case is that the wrong entity judged the defendant guilty.'" 491 U.S. at 269 (concurring opinion) (emphasis in original) (quoting *Rose*, 478 U.S. at 578). Constitutional error in a reasonable doubt instruction could be harmless "only in those 'rare situations' when 'the reviewing court can be confident that [such an] error did not play any role in the jury's verdict.'" *Id.* at 270 (quoting *Connecticut v. Johnson*, 460 U.S. at 87). In a different articulation, the test is whether there is a "reasonable possibility" that the error "might have contributed to the verdict." *Yates*, 111 S. Ct. at 1892-93 (quoting *Fahy v. Connecticut*, 375 U.S. 85, 86-87 (1963)). Any principled harmless error analysis here would thus have to be "wholly unlike the typical form of such analysis." *Carella*, 491 U.S. at 267 (concurring opinion). The focus must be on the role of the instruction, not on the weight of the evidence. *Id.* at 269; *Yates*, 111 S. Ct. at 1893-94. In a factually contested case, the role of the instruction is central, and any instruction that lowers the state's burden below that required by due process must necessarily have "contributed" to the verdict of jurors presumed to have followed that instruction.

A court's instruction on the burden of proof is in most cases, as it was here, the focal point of the evidentiary presentation, the advocacy of counsel, and the other instructions of the court. When the jury begins weighing fact and credibility to determine guilt, that instruction is the principle that guides its work. As it proceeds to determine the existence of each element, that instruction provides the measure by which it can declare the truth

found and its work done. What the jury concluded when that measure was unconstitutionally placed in the state's favor, to allow guilt on proof less than that required by due process, is known. What the result would be if the measure had been properly cast to require greater certainty is unknown and unknowable. It is certain that the fate of an accused depends on the measure of persuasion required; it is equally certain that the jury must rely on the instruction for that measure. So long as the evidence and its weight are disputed, the instructional error necessarily contributes to the verdict.

It may be possible to conceive of cases where instructional error as to reasonable doubt would be harmless error, but only if the jury were not actually weighing facts to determine guilt. Such a situation might perhaps arise where a jury determination of guilt is conceded, but the trial proceeds for other reasons -- to address sentencing questions, to preserve appellate review on a pre-trial ruling, or to otherwise present a question of law. In such a case, any reasonable doubt instruction given would play no role, and any error therein would be harmless.

In the vast majority of criminal trials, however, the outcome does depend on the jury's performance of its truth-finding function. In many trials the defense exercises its right to offer no evidence and relies solely on the presumption of innocence and the weakness of the prosecution's case. In such a case, the jury must decide whether the prosecution's evidence is sufficiently credible to establish each element of the offense beyond a reasonable doubt. In the present case, where the record reveals contested issues of fact, it is all the more clear that one cannot say the reasonable doubt instruction did not contribute to the jury's decision. Consistently with the principles that guarantee the defendant a jury's determination of guilt beyond a reasonable doubt, one

cannot say the error in this factually contested case was harmless.

E. The Louisiana Supreme Court Opinion on Harmless Error Represents Appellate Fact Finding Constitutionally Proscribed by the Sixth Amendment and Impermissible Under Any Interpretation of *Chapman v. California*.

The Louisiana Supreme Court's attempt at applying a form of harmless error analysis to this case demonstrates the impossibility of a principled and constitutional fact-based analysis where there are no reliable jury findings. It represents precisely the kind of appellate fact-finding that derogates the Sixth Amendment right to trial by jury. Finally, it is faithless to the requirement which underlies even a whole-record *Chapman* analysis -- that the state bear the burden of demonstrating that the error did not contribute to the conviction. *Chapman v. California*, 386 U.S. 18, 24 (1967).

As Justice Dennis argued in his dissent below, the majority of the Louisiana Supreme Court held this error to be harmless without correctly applying even a traditional whole-record *Chapman* harmless error test. (J.A. at 46). Instead of inquiring whether there was a "reasonable possibility" that the error contributed to the conviction, instead of requiring the state to prove beyond a reasonable doubt that it did not, and instead of analyzing the operation of the instruction itself, *Chapman*, 386 U.S. at 24, the court merely engaged in its own weighing of the evidence. The Louisiana Supreme Court's analysis, in its entirety, was as follows:

> [T]he testimony of Hillhouse fingering Sullivan as the leader and triggerman remains unrefuted, even in light of the deal given him in exchange for his testimony.

Whatever the weight given Lowery's identification of Sullivan in the photograph of the line-up and in her identification of Sullivan at trial, other evidence, albeit circumstantial, corroborates Hillhouse's version of the facts. The murder weapon, the flight bag, and the suit jacket worn by Sullivan during the crime were later found at the apartment shared by Sullivan and Wold. It was to this apartment that Sullivan had brought Hillhouse to meet his "wife" the morning of the murder.

The evidentiary record clearly supports a finding that the erroneous instruction was harmless beyond a reasonable doubt. *See Chapman, supra; Gibson, supra.* In light of this evidence, the impact of the erroneous instruction could not have affected the jury's deliberation as to Sullivan's guilt.

(J.A. at 27-28).

The Louisiana Supreme Court thus engaged in something both akin to a sufficiency review under *Jackson*, 443 U.S. at 319, and raw appellate fact-finding. By its language, "[w]hatever the weight given Lowery's identification," (J.A. 27), the court signalled *its* choice not to credit Lowery's testimony. Conversely, by its language, "even in light of the deal given him in exchange for his testimony," (J.A. 27), the court announced *its* choice to believe Hillhouse.

The Louisiana Supreme Court's analysis is wrong on several counts. First, the *Chapman* inquiry necessarily differs from a *Jackson* analysis in the questions it asks and in the burden of proof. In a *Chapman* analysis, the beneficiary of the error -- the state -- has the burden of proving that the error did not affect the outcome.

Chapman, 386 U.S. at 24. The court below, however, puts the burden on the defendant to demonstrate the opposite.

Second, the analysis gives no consideration to the nature of the error and its effect on the jury. The terms "grave uncertainty" and "actual substantial doubt," (J.A. 2), "suggest a higher degree of doubt than is required for acquittal under the reasonable doubt standard." *Cage*, 111 S. Ct. at 330. Recognizing that juries are presumed to follow the instructions they have been given, *see Yates*, 111 S. Ct. at 1893, the instruction made possible a conviction "based on a degree of proof below that required by the Due Process Clause," *Cage*, 111 S. Ct. at 330, by overstating the degree of uncertainty necessary to return a judgment of acquittal and by referring to "moral certainty" rather than evidentiary certainty. *Id.* The court's own weighing of the evidence completely ignores the question of how the instruction operated on the jury to the petitioner's detriment.

Third, the analysis clearly substitutes the reviewing court's consideration of the evidence for that of a properly instructed jury, contrary to this Court's instructions in *Bollenbach*, *Carella* and *Yates*. Lacking any guidance from jury findings of fact, the opinion simply reflects the reviewing court's own choices. The jury had several reasons to discredit Hillhouse's testimony that petitioner fired the fatal shot: Hillhouse's total immunity from prosecution, his incarceration through trial, the need for medical treatment following his interrogation by police, his initial statement to the police making mention only of "Bub," and the square conflict between the testimony of two defense witnesses, who recounted Hillhouse's statement that he was beaten by police, and Hillhouse's denial both that he was beaten and that he made any such statements. The Louisiana Supreme Court simply *chose* to believe Hillhouse, calling his testimony "unrefuted" despite the above, and altogether ignoring the reasons why that testimony might not be credited by a jury.

The Louisiana Supreme Court also *chose* to rely on circumstantial evidence as corroboration for Hillhouse. The circumstantial evidence, however, is linked to Sullivan principally by Hillhouse. It is Hillhouse who testified that the apartment where the gun and clothing were recovered was shared by Sullivan and his "wife," Hillhouse who linked Sullivan to the clothing which was said to be worn during the crime, and Hillhouse who testified that the watch worn by Sullivan when arrested "looked like" the watch that was taken during the robbery. The "corroboration" is part of the court's original choice to believe the testimony of an accomplice.

All this highlights the violence being done to the Sixth Amendment. The case comes to rest on the credibility of a single witness -- an accomplice enlisted by the government, perhaps after a beating by police, on a grant of total immunity -- to testify against a citizen accused. The determination whether to believe that government witness is being made as an original question -- without reference to any jury findings made beyond a reasonable doubt -- by representatives of the same government, not by citizens. The structural interposition of the jury between the government and the accused has been completely breached. The possibility that Hillhouse was lying, coerced by police brutality into fingering the person the police "figured" did it and already happened to have in custody, and rewarded by complete freedom if he stuck to that story, is resolved by the very government that brings the charge. This is precisely the vice the Sixth Amendment was intended to prevent.

The Louisiana Supreme Court's opinion demonstrates the futility of a principled application of harmless error analysis to an instruction that lowers the government's burden below that required by the Due Process Clause. Where there are contested issues of fact, no whole-record analysis can avoid the substitution of appellate fact-finding for non-existent jury findings beyond a reasonable

doubt. An accused constitutionally entitled to be convicted only on a jury's certainty about the facts is convicted instead on an appellate court's speculations born of reading the "dead record." *Bollenbach*, 326 U.S. at 615. To give life to the guarantees of the Constitution, the conviction must be reversed and John Sullivan afforded a trial by jury, with the benefit of a jury's determination of reasonable doubt.

CONCLUSION

Petitioner respectfully requests that the judgment affirming his conviction be reversed and that the case be remanded for a new trial.

Dated: December 3, 1992

Respectfully submitted,

William J. Keppel
Counsel of Record
Michael J. Wahoske
Christopher J. Riley
Tamara J. Byram
Karen A. Fairbairn
DORSEY & WHITNEY
220 South Sixth Street
Minneapolis, MN 55402
Telephone: (612) 340-2600

John Wilson Reed
GLASS & REED
338 Lafayette Street
New Orleans, LA 70130
Telephone: (504) 581-9065

Attorneys for Petitioner